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IN THE

Supreme Court of the United States

October Term, 1941.

No. 320.

SOUTHERN STEAMSHIP COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and

NATIONAL MARITIME UNION OF AMERICA,
Intervening Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

JOSEPH W. HENDERSON,
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TABLE OF CONTENTS IN PETITION.

	Page
Summary and Statement of Matter Involved	2
Opinions Below	6
Jurisdiction	6
Questions Involved	7
Reasons for Granting Petition	7

CASES CITED IN PETITION.

	Page
The Losmar, 20 F. Supp. 887 (D. C. Md. 1937)	8
National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939).....	8
National Labor Relations Board v. Waterman Steamship Co., 309 U. S. 206 (1940).....	5, 8
The Oakmar, 20 F. Supp. 650 (D. C. Md. 1937).....	8
Peninsular & Occidental Steamship Co. v. National Labor Relations Board, 98 F. (2d) 411 (C. C. A. 5th, 1938), cert. den. 305 U. S. 653 (1938)	8
Rees v. United States, 95 F. (2d) 784 (C. C. A. 4th, 1938)	8
Southern Steamship Company v. National Labor Relations Board, 120 F. (2d) 505	6

STATUTES.

	Page
Section 10 (e) and (f) of the National Labor Relations Act, July 5, 1935, c. 372, § 10, 49 Stat. 453 (29 U. S. C. A. Section 160 (e) and (f))	6
Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. Section 347 (a))	6

TABLE OF CONTENTS IN BRIEF.

Page

I. Seamen Under Shipping Articles Do Not Have the Right to Engage in a Strike on Board a Vessel Moored to a Dock in a Foreign Port.... 11

II. The Tenure of Employment of a Seaman Who Has Signed Shipping Articles for a Particular Voyage Terminates When He "Signs Off" at the Expiration of the Shipping Articles Unless the Seaman Affirmatively Establishes a Custom or Agreement to the Contrary..... 19

III. The Right of an Employer to Have Representatives Present at an Election to Determine Employees' Bargaining Representative Is Not Dependent Upon the Consent of the Labor Organizations Involved 21

Conclusion 21

CASES CITED IN BRIEF.

Page

Black Diamond S. S. Corp. v. National Labor Relations Board, 94 F. (2d) 875 (C. C. A. 2nd, 1938) cert. den. 304 U. S. 579 (1938) 15

The Losmar, 20 F. Supp. 887 (D. C. Md. 1937)..... 15

Marlin-Rockwell Corporation v. National Labor Relations Board, 116 F. (2d) 586 (C. C. A. 2d, 1941), cert. den. U. S. (October Term, 1941, No. 1032, decided June 2, 1941) 21

National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292 (1939) 19

National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939) 18

National Labor Relations Board v. Waterman Steamship Company, 309 U. S. 206 (1940)..... 20

The Oakmar, 20 F. Supp. 650 (D. C. Md. 1937)..... 15

Peninsular & Occidental Steamship Co. v. National Labor Relations Board, 98 F. (2d) 411 (C. C. A. 5th 1938) cert. den. 305 U. S. 653 (1938) 14

Rees v. United States, 95 F. (2d) 784, 792 (C. C. A. 4th, 1938) 13, 14, 15

Texas Company v. National Labor Relations Board, 120 F. (2d) 186 (C. C. A. 9th, 1941).....17, 18

The Velma L. Hamlin, 40 F. (2d) 852 (C. C. A. 4th, 1930) 20

Weisthoff v. American-Hawaiian S. S. Co., 79 F. (2d) 124 (C. C. A. 2nd, 1935) cert. den. 296 U. S. 619 (1935) 15

AUTHORITY.

	Page
Sit-down Strikes on Shipboard, 23 Cornell Law Quarterly, 302, 306-307 (note)	16

STATUTES

	Page
Revised Statutes § 4520, 46 U. S. C. A. § 574	19
Revised Statutes §§ 5359, 5360, 18 U. S. C. A. §§ 483, 484	14

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NATIONAL LABOR RELATIONS BOARD,

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AND

NATIONAL MARITIME UNION OF AMERICA,

Intervening Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Southern Steamship Company, prays that a writ of certiorari be issued to review a final decree of the United States Circuit Court of Appeals for the Third Circuit entered on May 20, 1941 (R. 786), granting the petition of the respondent, National Labor Relations Board (hereinafter called "Board") for the enforcement of its order, dated April 22, 1940, against petitioner, Southern Steamship Company, and dismissing petitioner's petition to review and set aside the Board's aforesaid order.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

The National Labor Relations Board instituted proceedings under the National Labor Relations Act against the petitioner, Southern Steamship Company, charging that petitioner had unlawfully terminated the employment of five members of the crew of the *SS. City of Fort Worth* and that petitioner had refused to bargain with the National Maritime Union of America [1] (hereinafter called "N. M. U.") after its certification by the Board. After hearing, the Board ordered Southern Steamship Company to reinstate with back pay the said five members of the crew and also six other members of the crew who had gone on a "sympathy" strike as a result of said termination and further ordered the petitioner to bargain collectively with the N. M. U. This order was affirmed by the United States Circuit Court of Appeals for the Third Circuit, and a decree enforcing the order was entered by said Court (R. 769, 786).

The petitioner has maintained and still maintains that:

(a) The seamen involved in this proceeding did not have the right to engage in a strike on board the *SS. City of Fort Worth* when she was moored to the dock at Houston, Texas, during her coastwise voyage from Philadelphia because they were seamen and also because they were under shipping articles; hence the failure to rehire the seamen engaged in said strike did not amount to an unfair labor practice within the meaning of the National Labor Relations Act.

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[1] The National Maritime Union of America was permitted to intervene as a party to the proceedings in the United States Circuit Court of Appeals by order entered September 16, 1940. (R. 767.)

(b) Irrespective of the strike by said seamen, their tenure of employment terminated when they "signed off" at the expiration of their Shipping Articles, and petitioner was not required to reëmploy them.

(c) The certification of N. M. U. was invalid because representatives of the petitioner had not been permitted to be present at the election and petitioner was justified in refusing to bargain with said organization.

The controversy in this proceeding concerns voyage No. 201 of the *SS. City of Fort Worth* from Philadelphia, its home port, to Houston and return. On June 30, 1938, the crew signed Shipping Articles at Philadelphia, the home port, before the local United States Shipping Commissioner, wherein, *inter alia*, they agreed "to conduct themselves in an orderly, faithful, honest and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of said Master . . . and of their superior officers, in everything relating to the vessel . . . ." (R. 681.)

The vessel sailed on July 1, 1938 with said crew. In the course of its voyage while the *SS. City of Forth Worth* was docked at Houston, not its home port, thirteen members of the crew held a meeting on shore on Sunday, July 17, 1938. They claimed they had previously requested a bargaining conference and also passes for the union delegates to board the ships while in port and having been informed that nothing had been accomplished concerning a bargaining conference or the securing of passes, they decided to strike for union recognition (R. 23, 129).

On the next day, Monday, July 18, 1938, the strike was started at 8 o'clock a. m. Tracey, an oiler, failed to turn

the steam on deck and refused to obey the command of Paul,[2] the First Assistant Engineer, to do so. When Paul then stated he would put the steam on deck himself, Tracey stated that he would "take the firemen out of the fire room" (R. 23, 132). Paul then turned the steam on, and Tracey called Braun, a fireman, to put the "fires out". Braun thereupon "threw his pumps and came out." (R. 23, 133.) When Robinson, the Second Engineer, told Tracey that he would put the steam on deck himself, Tracey said that there would be no steam after eight o'clock (R. 355).

Ferguson, a fireman who relieved Braun at eight o'clock, refused to tend the fires, and joined the other strikers who were seated on the poop deck.

At 10:30 o'clock that morning, Captain Rudan (who had just returned from Galveston) ordered the thirteen striking members of the crew collectively and individually to "turn to", and they individually and collectively refused to do so (R. 24, 435), Warren, the spokesman for the strikers, telling the master that they were striking for union recognition and passes (R. 24).

After Captain Rudan had waited an hour to see if the strikers would obey his commands and return to work (R. 436) the strikers still refused to perform their duties (R. 437). The master then went ashore and brought aboard the local Deputy United States Shipping Commissioner, from Houston, who read the Shipping Articles to the crew and explained to them what their obligations were, namely, *inter alia*, "to be obedient to the lawful commands of the Master . . . and of their superior officers . . . ."

Notwithstanding the orders of their superior officers

[2] Misnamed "Pool" in various instances in the Record. See R. 23, 367.

and the warnings of the United States Shipping Commissioner, the thirteen striking seamen continued their strike and occupied the poop deck of the vessel during the rest of the day. The strike was terminated at about seven o'clock that evening after the petitioner's local attorney had promised to recommend to the petitioner that it issue passes to representatives of the N. M. U.[3] (R. 24, 25.)

The voyage was completed when the vessel arrived at Philadelphia, and on July 25, 1938 the employment of all of the ship's crew, including the thirteen strikers, was terminated by their "signing off" before the local United States Shipping Commissioner. (R. 685.)

After "signing off", Warren, Phufl, Tracey, Ferguson, and Smith (five of the strikers) were informed by their superior officers that they would not be reshipped by the petitioner.[4]

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[3] The executive offices of the petitioner are located at Philadelphia. It is undisputed that no one at Houston had authority to make any agreement on behalf of petitioner permitting union delegates to board vessels, or recognizing any collective bargaining representative or waiving any misconduct of the crew in connection with the sit-down strike and their disobedience to orders of the vessel's officers.

[4] Petitioner has contended throughout these proceedings that the evidence adduced was insufficient to establish any custom or practice on the part of petitioner to vary the terms of the Shipping Articles and to hold that seamen when shipped by petitioner have a continuous tenure of employment as found under the evidence in *National Labor Relations Board v. Waterman Steamship Co.*, 309 U. S. 206 (1940). Moreover, other pertinent and relevant facts (in addition to the failure to establish a custom contradicting terms of the Shipping Articles) distinguish and differentiate this case from the *Waterman case.* See discussion infra on pages 19 and 20 of Brief.

When the other members of the crew learned that these five men would not be reshipped, seven more seamen [5] voluntarily left the ship and failed to "sign on" for another voyage.

JURISDICTION.

The final decree of the United States Circuit Court of Appeals for the Third Circuit was entered May 20, 1941 (R. 786).

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A. Section 347 (a)) and Section 10 (e) and (f) of the National Labor Relations Act, July 5, 1935, c. 372, § 10, 49 Stat. 453 (29 U. S. C. A. Section 160 (e) and (f)).

OPINIONS BELOW.

The findings of fact, conclusions of law and order of the National Labor Relations Board, filed on April 22, 1940, (R. 17-44) are reported in 23 N. L. R. B. No. 2.

The opinion of the United States Circuit Court of Appeals for the Third Circuit, written by Circuit Judge Maris, and concurred in by Circuit Judges Biggs, Jones and Goodrich (R. 769) with a dissent written by Circuit Judge Clark (R. 780) was filed on May 6, 1941, and is reported in *Southern Steamship Company v. National Labor Relations Board,* 120 F. (2d) 505.

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[5] Crassavaz, the boatswain; Reeves, an able-bodied seaman; Lathan and Burns, ordinary seamen; Hughes, an oiler; and Neeley and Holt, wipers. Later, Crassavaz voluntarily returned for employment and was "signed on" for a subsequent voyage.

QUESTIONS INVOLVED.

1. Do seamen who have signed and are serving on ship-board under United States Shipping Articles have the right to violate those articles by engaging in a strike on board the steamship moored to a dock in a foreign port?[6]

2. Where a seaman has signed United States Shipping Articles for a particular coastwise voyage and "signs off" at the end of said voyage, is his employment then terminated?

3. Did the National Labor Relations Board err in ruling that, "in the absence of consent of the labor organizations involved, company representatives should not be permitted to be present at elections to determine collective bargaining representatives"?

REASONS FOR GRANTING PETITION.

The petition should be granted because the United States Circuit Court of Appeals for the Third Circuit has decided an important question of federal law—namely, the right of seamen under Shipping Articles to engage in a strike on board a vessel moored to a dock in a foreign[6] port—which question has not been,[7] but should be, settled by your Honorable Court.

Further, the decision of this federal question is in conflict with decisions of the Circuit Courts of Appeals for

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[6] As contrasted with home port. See the dissenting opinion of Circuit Judge Clark (R. 781).

[7] See the majority opinion by Circuit Judge Maris, in which he states: "It is, therefore, clear that upon authority the question of the right of seamen to strike under the circumstances of the case before us is still an open one." (R. 777.)

the Fourth and Fifth Circuits and with two decisions of the District Court for the District of Maryland. *Peninsular & Occidental Steamship Co. v. National Labor Relations Board,* 98 F. (2d) 411 (C. C. A. 5th, 1938), cert. den. 305 U. S. 653 (1938); *Rees v. United States,* 95 F. (2d) 784 (C. C. A. 4th, 1938); *The Oakmar,* 20 F. Supp. 650 (D. C. Md. 1937); *The Losmar,* 20 F. Supp. 887 (D. C. Md. 1937).

The decision also is probably in conflict with applicable decisions of your Honorable Court (a) in sanctioning a "sit-down" strike by seamen on petitioner's vessel (Contra: *National Labor Relations Board v. Fansteel Metallurgical Corp.,* 306 U. S. 240 (1939)) and (b) in deciding that a seaman's tenure of employment does not terminate when he "signs off" Shipping Articles without proof by substantial evidence that the Shipping Articles had been modified by custom or agreement that the employment was to continue. (Cf. *National Labor Relations Board v. Waterman Steamship Co.,* 309 U. S. 206 (1940).)

The proper determination of this federal question is of great national importance, especially at this time when the security of the nation is so dependent not only upon its Navy but also upon the strike-free operation of its Merchant Marine. The law relating to the right to strike on land has no application to those who go down to the sea in ships.

SOUTHERN STEAMSHIP COMPANY

By JOSEPH W. HENDERSON,
Of Counsel.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

JOSEPH W. HENDERSON, being duly sworn according to law, deposes and says that he is counsel for the petitioner herein and that the facts set forth in the foregoing Petition are true and correct to the best of his knowledge, information and belief.

JOSEPH W. HENDERSON.

Sworn to and subscribed before me this 29th day of July, A. D. 1941.

GEORGE M. BRODHEAD, JR.,
(Seal) *Notary Public.*
My Commission expires January 19, 1943.

I hereby certify that I have examined the foregoing Petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

JOSEPH W. HENDERSON,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. . October Term, 1941.

SOUTHERN STEAMSHIP COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

AND

NATIONAL MARITIME UNION OF AMERICA,
Intervening Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions Below, Jurisdiction, Statement of the Case, and Questions Presented see pages 2 to 7 of the Petition.

I. Seamen Under Shipping Articles Do Not Have the Right to Engage in a Strike on Board a Vessel Moored to a Dock in a Foreign [1] Port.

The members of the crew of the petitioner's steamship, the *SS. City of Fort Worth*, on June 30, 1938, signed Shipping Articles before a local United States Shipping Com-

[1] As contrasted with home port. See the dissenting opinion of Circuit Judge Clark (R. 781).

missioner for a coastwise voyage from Philadelphia to Houston and other ports and return wherein they agreed, *inter alia*, to perform their duties and to obey the commands of their superior officers. (R. 681, 3.)

On Sunday, July 17, 1938, while ashore at Houston, not the home port, thirteen members of the crew decided to strike because the petitioner had not recognized the N. M. U. for purposes of collective bargaining and had refused passes on board its vessels for such representatives. (R. 23, 129.)

The following day, Monday, July 18, 1938, at about 8 a. m., the thirteen members of the crew, consisting of the boatswain, seamen, firemen, oilers, wipers, and the mess boy, staged a "sit-down" strike on board the vessel. This strike continued the entire day.

The men in the engine department refused to tend to fires and to turn steam on deck for the loading of cargo, while the men in the deck division refused to perform their duties. All of the strikers gathered together on the poop deck of the ship which place they occupied during the entire strike.

The Master ordered these seamen to perform their various duties (R. 24, 435) and the First Officer, the Chief Engineer and the Steward likewise ordered the seamen under them to "turn to" (R. 272, 273, 380, 381, 408). The United States Shipping Commissioner was brought aboard by the Master and he read to these strikers the Shipping Articles which they had signed and warned them of the consequences of their disobedience (R. 24, 437-440). Notwithstanding these orders and warnings, the strikers repeatedly refused to return to work but continued to occupy and possess the poop deck until seven o'clock that night when the strike was adjusted (R. 25, 137, 274).

The testimony shows that the strikers themselves considered the strike to be what is commonly known as a "sit-down" strike which was deliberately staged notwithstanding possible danger to the vessel while moored to the dock. Although no damage was occasioned, serious consequences might have resulted from these acts. The officers were required to assist the six men of the crew who did not strike in the care of the fires and the loading of the cargo during the entire day of Monday, July 18, 1941. The evidence showed that without fires it would have been impossible to have maintained the necessary steam pressure for loading and to have maintained adequate fire protection for the ship. (R. 354.) Notwithstanding these known dangers the strikers wilfully refused to perform their duties, took possession of the poop deck of the *SS. City of Fort Worth*, and were a law unto themselves for eleven hours.

Seamen have no right to strike. "The nature of their calling . . . imposes on them obligations not common to shore occupations." *Rees v. United States*, 95 F. (2d) 784, 792 (C. C. A. 4th 1938).

The unlawfulness of the strike in this case acquired a peculiar significance different from that of strikes on land not only because of the unique relationship between the seamen and their employer but also because of the fact that the strike occurred on board the vessel while she was moored to a dock in a foreign [2] port.

The Court below in its majority opinion realized that "the question of the right of seamen to strike under the circumstances" in this case "is still an open one" (R. 777)

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[2] As distinguished from home port. See dissenting opinion of Circuit Judge Clark (R. 781).

but drew an artificial distinction between a strike in a foreign[3] port and a strike in a domestic port.[4]

Circuit Judge Clark recognized the fallacy of this reasoning when he said in his dissenting opinion:

> "To bottom a general whitewash upon that fact overlooks, in my opinion, the very essence of maritime traffic. Such essence, here, as in the air, is the 'happy landing', the safe return of the vessel from its voyage." (R. 784.)

The law makes no distinction in questions of mutiny between disobedience of sailors at sea and in port. *Rees v. United States, supra.* Nor is any distinction made between mutiny in a domestic port and in a foreign port since the mutiny statute is applicable to acts not only on the high seas but also on waters within the admiralty and maritime jurisdiction of the United States. Revised Statutes §§ 5359, 5360, 18 U. S. C. A. §§ 483, 484.

The Court-below apparently conceded that the strike would have been unlawful if the ship had been at sea and, by inference (although it refused to decide), if the ship were in the port of a foreign power but held that the strike was lawful in a port of the United States. These classifications represent distinctions without any basic differences. In each case the authority of the master is flaunted, and safety of the ship is jeopardized.

In analogous situations inferior federal courts have refused to sanction strikes on board vessels. *Peninsular & Occidental Steamship Co. v. National Labor Relations Board,* 98 F. (2d) 411 (C. C. A. 5th 1938) cert. den. 305 U.

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[3] A port outside the jurisdiction of the United States.

[4] "Upon reason, however, we think that there is no sound basis for depriving seamen of this right when, as here, their vessel is moored to the dock in a *safe domestic port.* Whether the right exists in a foreign port we need not now decide." (R. 777.) (Italics ours.)

S. 653 (1938) where the crew staged a "sit-down" strike at Miami and refused to permit the use of the electrical equipment; *Rees v. United States, supra,* where the crew, while at Montevideo, staged a sympathetic "sit-down" strike by refusing to use steam or to "turn to"; *The Oakmar,* 20 F. Supp. 650 (D. C. Md. 1937), where the crew took possession of the ship and compelled the owners to obtain possession through court proceedings; *The Losmar,* 20 F. Supp. 887 (D. C. Md. 1937), where the crew took possession of the ship and compelled the owners to obtain possession through court proceedings but voluntarily left the ship before the hearing.

The Court-below erred in holding that the right of seamen to strike on board a vessel *under circumstances present in this case* can be inferred from the two cases of *Weisthoff v. American-Hawaiian S. S. Co.,* 79 F. (2d) 124 (C. C. A. 2nd, 1935) cert. den. 296 U. S. 619 (1935) and *Black Diamond S. S. Corp. v. National Labor Relations Board,* 94 F. (2d) 875 (C. C. A. 2nd, 1938) cert. den. 304 U. S. 579 (1938).

The *Weisthoff case* did not concern a labor dispute nor was it a criminal proceeding. Sailors who refused to work or to leave the ship until compelled to do so sued for wages. The Court permitted recovery because the master had violated statutory regulations in causing watches to be broken and had required the seamen to work overtime. Since not every mutiny results in the forfeiture of wages, it is a *non sequitur* to say that the acts did not constitute mutiny merely because there was no forfeiture of wages in that case.

The *Black Diamond case* is even less applicable. In that case there was no strike *on board* the vessel but the engineers voluntarily left their ships prior to sailings.

A strong American merchant marine can never be developed and maintained if seamen may strike on board their vessels wherever they may be moored. The authority of the master must still be upheld by the Courts.

> "To advocate strikes on board a ship at its pier merely on the basis that, in such circumstances, the safety of lives and cargo is not endangered, is to take a short-sighted point of view. No doubt, while a vessel is in port, the immediate security of all concerned is not greatly jeopardized by the crew's refusal to do its duty. But it is not alone the immediate safety or the present security which must be considered. There is an ultimate safety which must be protected. For this there must be discipline at all times, whether the ship be at sea or tied to shore in the safest of harbors. A master who cannot control his crew in port is not likely to be able to control it at sea. To allow the seamen to resist lawful commands in one place is but to encourage similar resistance elsewhere."
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> Sit-down Strikes on Shipboard, 23 Cornell Law Quarterly, 302, 306-307 (note).

From time immemorial the master of the ship has been supreme in command. There are sensible and sound reasons for that relationship which your Honorable Court knows without any further statement from the petitioner. The law which permits strikes on land cannot possibly be held applicable to those men who go down to the sea in ships. Seamen should not be allowed to strike under circumstances similar to the instant case. It would result in a complete breakdown and demoralization of the responsibility for life and property aboard the ship. Seamen from earliest days have known that the master is the final authority on board his vessel. If seamen who feel they are

aggrieved are permitted to flaunt the authority of their master by refusing to obey his lawful commands and then engaging in a strike, the law of the sea, so far as responsibility of the master and crew are concerned, would be revolutionized. The far-reaching effects of such a revolutionary change are so obvious that the petitioner will not take the time to point them out.

There must be a different law for strikes on ships and those on land. The seaman must be made to reaffirm that which he has always known and understood, namely, to obey the master's lawful commands or suffer the consequences for disobedience.

These are upset times. Our fighting ships—represented by the Navy—and our Merchant Marine—represented by such ships as the *S. S. City of Fort Worth*—have their very material part to play in our nation's future and its present safety. That future and our country's safety will be seriously jeopardized if seamen are legally permitted to strike.

> "Seamen must recognize that the nature of their calling, which gives them a unique status under the law, also imposes upon them obligations not common to shore occupations."[5]

The master's discharge of his boatswain for habitual drunkenness was upheld in *Texas Company v. National Labor Relations Board,* 120 F. (2d) 186 (C. C. A. 9th, 1941). In that case the Court held that the Board (which ordered re-employment) had ignored during the entire

[5] Economic Survey of the American Merchant Marine submitted to Congress by Joseph P. Kennedy, as Chairman of the United States Marine Commission—quoted with approval in *Rees v. United States,* 95 F. (2d) 784, 792 (C. C. A. 4th, 1938).

proceeding "the long established Congressional legislational for the protection of life at sea" and had misconceived "the powers of a ship's officers and managers necessary in such protection" and that the Board had erred "in failing to recognize that these maritime safety laws are paramount to the Labor Relations Act wherever the Board's proposed orders may increase the danger which the long established safety legislation of Congress seeks to prevent or lessen."

"The duties and obligations of the master of the ship in making up and controlling his crew cannot be determined by the study of the management of, say, a great automobile factory. . . . The master must have the power to compel the services of such men for the safety of all on board." *Texas Company v. National Labor Relations Board*, supra at page 187. This is all the more so when some of the strikers (like Warren, who was their spokesman, and Crassavaz, who was the boatswain) occupy some position of authority such as a spokesman or as an under-officer of a ship. "The men elected to represent the crew or a part of it, can make or break the discipline necessary in the vessel's navigation and management for the safety of everyone on board." *Texas Company v. National Labor Relations Board*, supra at page 189.

Moreover, irrespective of the unique status of the participants in the strike and of the place where the strike occurred, the petitioner had the right to discharge the seamen. The testimony in this case shows not only that the strike was what is known as a "sit-down" strike and, therefore, unlawful but also that the strikers themselves considered the strike to be a "sit-down" strike. *National Labor Relations Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939).

II. The Tenure of Employment of a Seaman Who Has Signed Shipping Articles for a Particular Voyage Terminates When He "Signs Off" at the Expiration of the Shipping Articles Unless the Seaman Affirmatively Establishes a Custom or Agreement to the Contrary.

The Shipping Articles which are required of the Master and his crew (Revised Statutes § 4520, 46 U. S. C. A. § 574) constitute the sole memorial of the crew's contract of employment.

The Court-below and the Board erred in holding that "the tenure of employment . . . was not terminated by the expiration of the shipping articles" (R. 27, 773).

The evidence adduced was insufficient to support a finding that the terms of employment embodied in the Shipping Articles had been modified. The burden was on the seamen to prove such a fact, but the evidence in this case did not meet the standard set forth in *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292 (1939).

First Officer Helland testified that it was the *custom* of the petitioner to tell the seamen when they were paid off whether or not petitioner desired them to continue to work on the vessel and to make the next trip. This was usually accomplished by re-signing the men who were to be reëmployed at the time they "signed off" from the previous voyage, and by telling at that time those seamen whom petitioner did not want to reship that their future services were not desired. (R. 300, 301). The only custom established by the evidence was that a seaman could consider he was reëmployed on the next voyage, if new shipping articles were not immediately signed and he had not heard anything to the contrary from his officers.

The only other testimony concerning a practice or custom was that of four of the five seamen who had not been offered reëmployment. Their testimony only related to what their status had been during the several times when they had not immediately signed new articles but had not received any instructions from their officers concerning further employment (R. 154, 184, 185, 200, 221, 222). In those cases the seamen actually continued at work on the ship in the intervals between their signing off and signing new shipping articles and were paid for such work.

In *National Labor Relations Board v. Waterman Steamship Company*, 309 U. S. 206 (1940) a custom was proved to the satisfaction of the Board and your Honorable Court that the seamen on the Waterman ships had a continuous employment. In that case, however, extensive testimony was adduced both from the crew and from the officers of the steamship company concerning practices as far back as 1924. Moreover, the factual situation in that case as well as the proofs submitted were so different that the Court below and the Board erred in applying that decision to the question involved in this proceeding. In the *Waterman case* the entire unlicensed crew and first steward of the *SS. Bienville* and all but three of the crew of the *SS. Fairland* were discharged after the vessels had returned from their respective voyages from Europe and the West Indies and had been laid up for dry-docking and repairs.

We submit that in this case the relationship of employer and employee had automatically terminated at the port of discharge. *The Velma L. Hamlin*, 40 F. (2d) 852 (C. C. A. 4th, 1930). Petitioner was under no obligation to reëmploy any seaman at the expiration of his articles, unless petitioner desired to do so.

III. The Right of an Employer to Have Representatives Present at an election to Determine Employees' Bargaining Representative Is Not Dependent Upon the Consent of the Labor Organizations Involved.

The proper conduct of any election requires that the parties affected by the election be entitled to have observers at the election to identify voters and to see that the balloting is fairly conducted. This right is fundamental to all elections and to make elections under the National Labor Relations Act an exception would be denying the employer a fair hearing and would violate the Fifth Amendment to the Constitution of the United States, notwithstanding the decision in *Marlin-Rockwell Corporation v. National Labor Relations Board*, 116 F. (2d) 586 (C. C. A. 2d, 1941), cert. den. — U. S. — (October Term, 1941, No. 1032, decided June 2, 1941). Petitioner should have had an opportunity to challenge the right of those whom it might have thought ineligible to vote and to defend the right of those whose vote might have been challenged by other parties present. Furthermore, the petitioner has no means of knowing and does not know whether or not the persons who voted under the names appearing on petitioner's payroll were actually the same persons then employed by petitioner. The opportunities for fraud and mistakes in the conduct of the election are obvious; the equally obvious means of guarding against them were rejected by the Board.

CONCLUSION.

We, therefore, submit that the petitioner was not guilty of any unfair labor practice; that the United States Circuit Court of Appeals for the Third Circuit erred in affirming the order of the National Labor Relations Board; and that

e petitioner's prayer for a writ of certiorari should be anted.

Respectfully submitted,

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iladelphia, Pa.,
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